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In the Supreme Court of the United States

OCTOBER TERM, 1975

IN THE MATTER OF THE WITNESS CHARLES G. BERRY,
PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions and statute involved	2
Statement	3
A. Summary of facts	5
B. The subpoena and first contempt judgment	8
C. Petitioner's initial compliance with the subpoena	12
D. The second and third contempts	17
E. The decision of the court of appeals	19
Argument	20
Conclusion	34

CITATIONS

Cases:

Bellis v. *United States*, 417 U.S. 85	29, 30
Blair v. *United States*, 250 U.S. 273	23, 27
Boyd v. *United States*, 116 U.S. 616	29
Branzburg v. *Hayes*, 408 U.S. 665	23, 27
Brown v. *United States*, 276 U.S. 134	21, 24
Cobbledick v. *United States*, 309 U.S. 323	22
Couch v. *United States*, 409 U.S. 322	29, 31
Dreier v. *United States*, 221 U.S. 394	29
Estelle v. *Dorrough*, 420 U.S. 534	32
Gelbard v. *United States*, 408 U.S. 41	34
Grant v. *United States*, 227 U.S. 74	29

Cases—Continued — Page

Griffin v. *Illinois*, 351 U.S. 12 32
Hale v. *Henkel*, 201 U.S. 43 25
Mara v. *United States*, 454 F.2d 580, reversed, 410 U.S. 19 27
McMann v. *Securities and Exchange Commission*, 87 F.2d 377, certiorari denied, 301 U.S. 684 25
Michaelson, In re, 511 F.2d 882, certiorari denied May 19, 1975, No. 74-1101 31
Reamer v. *Beall*, 506 F.2d 1345, certiorari denied, 420 U.S. 955 30
Ross v. *Moffitt*, 417 U.S. 600 32
Schwimmer v. *United States*, 232 F.2d 855 (C.A. 8), certiorari denied, 352 U.S. 833 ..... 25, 26
Securities & Exchange Commission v. *First Security Bank of Utah*, 447 F.2d 766 31
Shillitani v. *United States*, 384 U.S. 364 32
Taglianetti v. *United States*, 394 U.S. 316 34
United States v. *Bisceglia*, 420 U.S. 141 ..... 23, 25
United States v. *Calandra*, 414 U.S. 338 ..... 23, 25, 27
United States v. *Dionisio*, 410 U.S. 1 ..... 24, 27
United States v. *Fleischman*, 339 U.S. 349 30
United States v. *Hodgson*, 492 F.2d 1175 31
United States v. *Judson*, 322 F.2d 460 30-31
United States v. *Kasmir*, 499 F.2d 444, certiorari granted, 420 U.S. 906 30
United States v. *Liddy*, 510 F.2d 669, certiorari denied, 420 U.S. 980 32

Cases—Continued — Page

United States v. *Miller*, 500 F.2d 751, certiorari granted, June 9, 1975, No. 74-1179 22
United States v. *Morton Salt Co.*, 338 U.S. 632 23
United States v. *Nixon*, 418 U.S. 683 ..... 22, 24
United States v. *Nobles*, No. 74-634, decided June 23, 1975 31
United States v. *Ponder*, 475 F.2d 37 31
United States v. *Ryan*, 402 U.S. 530 22
United States v. *White*, 322 U.S. 694 ..... 29, 30
Wheeler v. *United States*, 226 U.S. 478 29
Wilson v. *United States*, 221 U.S. 361 29

Constitution, statutes and rule:

United States Constitution:
First Amendment 11, 14
Fourth Amendment 2, 9, 11, 13, 14, 20, 21, 22, 24, 25
Fifth Amendment 2, 7, 8, 11, 14, 16, 17, 18, 19, 28, 29, 30, 31
Sixth Amendment 14
2 U.S.C. (Supp. III) 431, *et seq.* 4
18 U.S.C. 610 4
18 U.S.C. 1341 4
28 U.S.C. 1826 ..... 2, 3, 32, 33
28 U.S.C. 1826(a) 3, 4, 6, 7, 12
28 U.S.C. 1826(b) 3, 6, 7, 12, 31, 32
18 U.S.C. 1951 4
18 U.S.C. 1952 4
18 U.S.C. 3321 28
18 U.S.C. 3331 28
18 U.S.C. 3333 28
Rule 6, Fed. R. Crim. P. 28
Rule 6(e), Fed. R. Crim. P. 26, 28

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 33a-43a), as corrected (Pet. App. 44a-45a), is not yet reported. The June 23, 1975, opinion and order of the district court (Pet. App. 3a-21a) and the July 2, 1975, opinion and order of the district court (Pet. App. 24a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1975. The petition for a writ of cer-

tiorari was filed on August 29, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the grand jury's subpoena *duces tecum* in this case is invalid because not supported by a sufficient showing of materiality and necessity or of probable cause.

2. Whether the Fifth Amendment privilege against compelled self-incrimination may be asserted by a lawyer on behalf of clients as grounds to withhold from a grand jury records of a law firm reflecting the financial transactions of the firm.

3. Whether the expedited appeal procedures of 28 U.S.C. 1826 deprived petitioner of due process of law.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Fourth Amendment to the United States Constitution states in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

28 U.S.C. 1826 provides:

> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—
>
> (1) the court proceeding, or
>
> (2) the term of the grand jury, including extensions,
>
> before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.
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> (b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

STATEMENT

We believe, as did the courts below, that the legal contentions presented by this petition are wholly

lacking in merit. Nevertheless, because of the complex factual background and the extensiveness of the litigation to date in the district court, the court of appeals and this Court, and because we do not entirely accept the emphasis, tone and inferences contained in petitioner's statement of the case, we are setting forth herein a factual statement of considerable length.

These proceedings involve three separate cases, all concerning orders, entered pursuant to 28 U.S.C. 1826(a) by the Honorable Howard Bratton, United States District Judge for the District of New Mexico, holding petitioner in civil contempt. All three contempt judgments relate to efforts by the district court to enforce a single subpoena *duces tecum* returnable before a federal grand jury empanelled in the District of New Mexico.[1]

During the extended litigation involving the subpoena addressed to petitioner, the government has consistently pointed out that potential statute of limitations problems threaten to jeopardize the grand jury's investigation and that any delay necessarily works to the advantage of potential targets of the investigation. (Petitioner's law partner is a target of the investigation. See Tr. 327-328.) It is significant in this regard that both the district court and the court of appeals concluded that both petitioner's appeal to the court of appeals and his petition for a writ of certiorari are frivolous and filed for the purpose of delay (Pet. App. 23a, 46a).

[1] The subpoena *duces tecum* involved in this case was issued by the grand jury pursuant to an ongoing investigation involving allegations of criminal violations relating, *inter alia*, to political campaigns—specifically, potential violations of 18 U.S.C. 610 (relating to political contributions by national banks, corporations or labor organizations) and 2 U.S.C. (Supp. III) 431, *et seq.* (the Federal Election Campaign Act of 1971, as amended). In addition, the grand jury is also investigating possible violations of 18 U.S.C. 1341 (mail fraud), 18 U.S.C. 1951 (the Hobbs Act), and 18 U.S.C. 1952 (the Travel Act), in regard to wrong-doing by public officials. The investigation involves, *inter alia*, the primary election in the spring of 1970, the general election in the fall of 1970, the primary election in the spring of 1972, and the general election in the fall of 1972, as well as the financing in advance thereof.

A. Summary of Facts

On April 21, 1975, petitioner was served with a subpoena *duces tecum* returnable on April 25, 1975, ordering him to bring certain financial records of his law firm, a professional corporation, before the grand jury (Pet. App. 1a-2a). On April 23, 1975, he filed a motion to quash the subpoena (Pet. App. 2a-3a), which motion was denied (Tr. 52).[2] On April 25, 1975, after petitioner refused to comply with the subpoena, the district court sought to enforce the subpoena by ordering petitioner to produce the records on April 30, 1975 (Tr. 97). When petitioner refused to produce the records on April 30, Judge Bratton entered an order on May 1, 1975, adjudging peti-

[2] "Tr." refers to the 13-volume transcript of proceedings (a total of 1098 pages), covering all of the efforts by the district court to enforce the subpoena *duces tecum*.

tioner in civil contempt for refusing to obey the order of April 25 (Tr. 244-245).[2a]

On May 19, 1975, petitioner appeared before the grand jury with 35 boxes of subpoenaed financial records and three ledger books. He submitted one box of subpoenaed financial records, which was admitted in evidence before the grand jury, and claimed that 34 additional boxes of subpoenaed records and the three ledger books were privileged (Tr. 305-477). The district court thereupon set aside the May 1, 1975, judgment of civil contempt.[3]

On July 2, 1975, Judge Bratton entered another order pursuant to 28 U.S.C. 1826(a) (Pet. App. 22a), adjudging petitioner in civil contempt of court for refusing to obey an order entered by the court

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[2a] Pursuant to 28 U.S.C. 1826(b), Judge Bratton denied petitioner's motion of May 1, 1975, for bail pending appeal on the grounds that the appeal was not taken in good faith and was for the purpose of delay (Tr. 249-250). The Tenth Circuit also denied petitioner's motion for release on bond pending appeal.

On May 8, 1975, Mr. Justice Marshall denied petitioner's application for a stay and for release on bond pending appeal (No. A-920). Petitioner surrendered to the United States Marshal on May 8, 1975, and remained in custody until May 16, 1975, when he was released on his own recognizance based upon his representation that he intended to purge himself of contempt by complying on May 19, 1975, with the court's order (Tr. 288, 298).

[3] The district court concluded that since petitioner had physically produced all of the records demanded by the subpoena and permitted them to be marked as grand jury exhibits, he had complied with the terms of the subpoena and thereby purged himself of the May 1 contempt judgment. The court of appeals agreed. See Pet. App. 36a.

on June 23, 1975 (Pet. App. 20a-21a). That order had been entered after a series of *ex parte, in camera* hearings dealing with the various claims of privilege raised by petitioner as grounds for withholding the subpoenaed records from the grand jury. In rejecting these claims of privilege, the court ordered petitioner to produce before the grand jury the three ledger books and 23 of the 34 boxes of subpoenaed financial records he had withheld on May 19, 1975.[4]

On July 9, 1975, Judge Bratton entered a third order pursuant to 28 U.S.C. 1826(a) (Pet. App. 31a), adjudging petitioner in civil contempt for refusing to obey a separate court order of July 2, 1975 (Pet. App. 30a). That order was entered after the court had evaluated petitioner's assertion before the grand jury on June 27, 1975 (Tr. 767-898) of the Fifth Amendment privilege against self-incrimination as grounds to withhold all of the subpoenaed trust account ledger cards and four general account

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[4] Pursuant to 28 U.S.C. 1826(b), Judge Bratton denied petitioner's motion of July 2, 1975, for bail pending appeal on the grounds that the appeal was frivolous and taken for the purpose of delay (Tr. 963-965). See Pet. App. 23a. The Tenth Circuit also denied petitioner's motion for release on bond, and he surrendered to the United States Marshal.

On July 7, 1975, petitioner filed in the district court a motion for limited confinement, requesting that the court limit his confinement to weekends and evenings so he could be released during the day to continue to practice law. The district court denied that motion on July 9, 1975 (Tr. 1085). On July 16, 1975, the Tenth Circuit denied release on bond pending appeal.

ledger cards. The court rejected the claim of Fifth Amendment privilege and ordered petitioner to produce the relevant materials on July 8, 1975; petitioner refused.[5]

On appeal, the court of appeals affirmed the actions of the district court.

B. The Subpoena and First Contempt Judgment

On April 21, 1975, petitioner, in his capacity as an officer of Marchiondo & Berry, P.A. (an Albuquerque law firm) was personally served with a subpoena *duces tecum* returnable on April 25, 1975,

[5] In the case of the July 9 contempt adjudication, Judge Bratton did not find that petitioner's appeal was frivolous and therefore ordered his release on personal recognizance in that case only, making clear that the order denying bond pending appeal in the earlier case remained in effect (Tr. 1083-1084). See Pet. App. 32a. On August 11, 1975, the Tenth Circuit, considering the three consolidated cases before it, denied petitioner's motion for admission to bail pending determination of his petition for certiorari, finding, *inter alia*, that petitioner's contentions are "frivolous" and that "[a] petition for certiorari, if filed, will be merely for delay" (Pet. App. 46a).

On August 28, 1975, Mr. Justice White denied petitioner's emergency petition to stay the order of confinement and to admit him to bail pending a determination on his petition for a writ of certiorari (No. A-149). The application was resubmitted, and, on August 29, 1975, it was denied by Mr. Justice Marshall. At petitioner's request, the application was then sent to Mr. Justice Douglas who, on September 18, 1975, referred it to the whole Court for determination. On October 6, 1975, the Court denied petitioner's application for stay of confinement.

Since July 3, 1975, petitioner has been and remains in full-time custody (see Pet. App. 23a).

before a federal grand jury sitting in the District of New Mexico. The subpoena required petitioner to bring to the Grand Jury

> for the period from January 1, 1970 to the date of the subpoena, any and all financial records of any type or description which relate, either directly or indirectly, to the financial affairs of Marchiondo & Berry, P.A., any of its predecessor or successor entities or organizations and any entities or organizations which are, either directly or indirectly, affiliated or related to said Professional Association, its predecessor or successor entities or organizations, which records should include but not be limited to any and all books, ledgers, journals or records of any type relating to income and expenses from professional fees, legal fees or any other type of income; any and all bank statements, cancelled checks, deposit slips or passbooks relating to any checking or savings accounts of said organizations or entities; and any and all records or correspondence of any type, not covered by the attorney-client privilege, with any person or entity relating either directly or indirectly to any of the above records, documents and objects. [Pet. App. 1a-2a.]

On April 23, 1975, petitioner filed a motion to quash the subpoena on the grounds that it violated the Fourth Amendment's protection against unlawful search and seizure of the Marchiondo & Berry Professional Association.

A hearing on the motion to quash was held on April 23, during which the government made an extensive proffer as to the grand jury's current

investigation in order to establish the reasonableness of the subpoena (Tr. 13-25). Briefly, the government demonstrated that the grand jury was involved in an extensive investigation of "criminal wrongdoing in the political field" (Tr. 14), including alleged violations of the campaign financing and campaign contributions laws, the mail fraud statute, the Hobbs Act and the Travel Act. *Ibid.*; see also note 1, *supra*. The proffer contained a brief outline of some of the evidence before the grand jury including, *inter alia*, indications of the laundering of illegal campaign contributions, possible kickbacks to public officials, and the relationship of the Marchiondo and Berry law firm (including the attempted creation of false law firm financial records) to such activities (Tr. 18-23). Because of the sensitive nature of the grand jury's investigation, the complete proffer made by the Assistant United States Attorney is being lodged with the Clerk under seal.[6]

The district court denied petitioner's motion to quash. On April 25, 1975, petitioner appeared before

[6] Three documents were lodged with the Clerk and provided to petitioner's counsel in connection with petitioner's application for stay of confinement (No. A-149). They are being lodged with the Clerk again for consideration in connection with the instant opposition to certiorari. The oral proffer by the Assistant United States Attorney is contained in Appendix A. As the litigation continued, further investigation produced additional evidence to support the reasonableness of the subpoena. This evidence was presented to the district court as a supplemental written proffer (Appendix B). Appendix C describes in fuller detail the potential statute of limitations problems.

the grand jury but refused to produce the records called for in the subpoena (Tr. 60-78). The government then requested a hearing, which was held that same day, to secure enforcement of the subpoena. Judge Bratton first clarified the subpoena by specifying that client files were not to be produced pursuant to the subpoena and that the correspondence called for in the last clause of the subpoena need not be produced immediately (Tr. 96-97). With these modifications, petitioner was ordered by the district court to produce the records called for, except that he was to segregate and have available for *in camera* inspection by the court, *ex parte*, those records regarding which he asserted either an attorney-client privilege or a Fifth Amendment privilege against self-incrimination (Tr. 97).[7]

On April 30, 1975, petitioner again appeared before the grand jury, but refused to produce the records called for by the subpoena as modified by the district court. He claimed that the subpoena violated the Fourth Amendment rights of himself and his law firm, the First and Fifth Amendments, and the attorney-client privilege in that the subpoena would result in the disclosure of the identity of all of the law firm's clients (Tr. 122-123). In view of this continued refusal to produce the subpoenaed records, a hearing was held in open court

[7] After this hearing, the district court polled the grand jury and determined that it was unanimous in its desire to have the subpoena enforced and the records produced before it as part of its investigation (Tr. 111).

on May 1, 1975, at which time the government moved that petitioner be held in civil contempt pursuant to 28 U.S.C. 1826(a). Petitioner testified at the hearing, admitting that he had not complied with the subpoena as modified (Tr. 222) and refusing to produce for *in camera* inspection the records as to which he claimed privilege (Tr. 234). At the conclusion of this hearing, the district court made findings of fact, adjudged petitioner in civil contempt and ordered his confinement (Tr. 240-245). Petitioner ultimately surrendered into federal custody on May 8, 1975, and remained incarcerated until May 16, 1975.[8]

C. Petitioner's Initial Compliance with the Subpoena

On Friday, May 16, 1975, after discussions with the district court, petitioner agreed to comply with the court's original order of April 25, 1975, as modified. It was understood that petitioner would physically produce all the records required by the subpoena to be produced and that petitioner then could raise those claims of privilege he deemed applicable to pertinent records, which claims would be resolved by the court before those materials were disclosed

[8] Petitioner's motion for bail pending appeal was denied pursuant to 28 U.S.C. 1826(b) on the grounds that the appeal was not taken in good faith and was for the purpose of delay (Tr. 249-250). The decision to deny release was upheld by the Tenth Circuit and by Mr. Justice Marshall. See note 2a, *supra*.

to the grand jury (Tr. 282-286, 288, 289).[9] He was thereupon released on his own recognizance for the weekend, to appear before the grand jury on Monday, May 19, 1975.

On May 19, 1975, petitioner appeared before the grand jury and, pursuant to the court's order of April 25, 1975, he brought with him all of the records called for by the subpoena *duces tecum*, as modified by the court (Tr. 306-477). He produced 35 boxes of records and three ledger books, which were marked as grand jury exhibits (numbers 841 through 878) (Tr. 312, 319, 323).[10] However, petitioner agreed to turn over only one of the boxes of records to the grand jury, namely Exhibit No. 841 (Tr. 310-319, 362-364).[11]

[9] Petitioner maintained that such compliance, made under prospect of continued confinement, did not constitute a waiver of his previously stated Fourth Amendment objection that the subpoena was unreasonable. The government argued that such compliance did in fact constitute a waiver of his objection. Petitioner further acknowledged that if the district court were to overrule any claims of privilege after the *in camera* examination, he would be ordered to turn the records over to the grand jury and could be again held in contempt if he failed to do so (Tr. 254-292).

[10] A specific enumeration of these records is found in the opinion of the district court. See Pet. App. 4a-6a.

[11] The box of records marked Grand Jury Exhibit No. 841, contained the general office checking account journal of the law firm for the period covered by the subpoena, January 1970 to March 1975. It consists of N.C.R. entries, on yellow ledger sheets, of the name of the payee of the check, the date, the amount of the check, and other similar types of information, in summary form, relating only to law firm expenditures by

Petitioner refused to authenticate and turn over to the grand jury the balance of the subpoenaed records. The records that he refused to disclose consisted of three ledgers; eleven boxes of cancelled checks, bank statements, and deposit slips; nine boxes of payment vouchers and invoices; nine boxes of individual client account cards; one box of general account ledger cards; one box of trust account ledger cards; one box of trust account receipt books; one box of general account receipt books; and one box of miscellaneous items (Tr. 475-477). As grounds for withholding these 37 exhibits, petitioner cited the Fourth Amendment, the Fifth Amendment privilege against self-incrimination of his clients, of himself and of all members of his law firm, and the First and Sixth Amendment rights of his clients; he further asserted the attorney-client privilege, the work product doctrine and the canons of ethics. He also claimed that the subpoena violated his own right to privacy, as well as that of his law firm, clients, associates, and employees (Tr. 342-380).

Petitioner's production of the records specified in the subpoena, although still coupled with a refusal to disclose them to the grand jury, was deemed by the district court to constitute compliance with the April 25 order. Accordingly, the court made find-

way of checks drawn on the law firm's general office checking account. It does not include the cancelled checks, nor does it provide any information about the law firm's trust checking accounts. See Tr. 314-319.

ings that petitioner had purged himself of the May 1 contempt and, on May 22, 1975, it vacated and set aside the judgment of civil contempt.

Meanwhile, on May 19, 1975, the government moved the district court to hold *ex parte* hearings in chambers with petitioner and his attorneys in order to resolve whether petitioner had properly asserted any privilege as to the records he declined to turn over to the grand jury. During the course of the next month, the district court conducted a series of *ex parte* hearings in chambers with petitioner and his attorneys. On June 23, 1975, the district court issued a memorandum and order concerning petitioner's claims of privilege (Pet. App. 3a-19a).[12]

In rejecting petitioner's various claims of privilege, the court ordered him to appear before the grand jury on June 27, 1975, and to produce the three ledger books and 23 of the 34 boxes of subpoenaed financial records. The boxes that petitioner was ordered to produce included all of the exhibits *except* nine boxes containing the individual client account cards, the one box of trust account ledger cards, and the one box of miscellaneous records. The court excluded the client cards because it found that "a few of them do arguably contain confidential

[12] The government was not a party to these hearings and did not receive transcripts of them; we therefore have very little knowledge of what occurred. The district court's memorandum and order, found in Petitioner's Appendix at pages 3a-19a, purports to be an expurgated version from which all names and other identifying information have been deleted.

attorney-client communications" (Pet. App. 8a). Also excluded were "any financial records which pertain to pending federal criminal cases where an indictment or information has been filed" (Pet. App. 9a). Finally, the court also ordered petitioner to assert before the grand jury the Fifth Amendment privilege against self-incrimination as to specific records contained in the box of trust account ledger cards and four of the general account ledger cards. "Then, upon motion of the Government acting at the direction of the grand jury, the court will examine these records *in camera* and rule upon the Fifth Amendment claims" (Pet. App. 10a).[13]

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[13] The district court also rejected petitioner's suggestion that the subpoena was oppressive and concluded that a "substantial portion" of his claims of privilege "are so patently frivolous that they cannot be claimed in good faith" (Pet. App. 6a-7a). The court continued (Pet. App. 7a-8a):

> The short answer to Mr. Berry's objection is that he should assert only those privileges he can raise in good faith. Notwithstanding the statute of limitations problem, the court gave Mr. Berry 19 days in which to make specific claims of privileges as to certain documents. Never during that period was the court informed that that was an insufficient length of time. * * *
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> The second way in which Mr. Berry has sought to build a record that the subpoena is oppressive is by attempting to show that the records are so interrelated that to produce even the most clearly non-privileged documents is to violate privileges as to others. Accordingly, he argues he need not produce any. Thus, for example, he refuses to produce cancelled checks because these relate to disbursements made on behalf of a client and are reflected on a client card. In the same manner Mr. Berry refused to produce bank statements and deposit slips. Copies of all these documents are kept with the bank's business records, and any claim that they are privileged is meritless.
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> Rather than produce many of the records and claim privileges in good faith as to the remaining, Mr. Berry has repeatedly maintained that the grand jury should have to request the records of specific clients or as to specific transactions. To adopt such a narrow view of the grand jury's investigative powers is to so hobble them that it is unlikely they can successfully carry out their duties.
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> * * * * *
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> In light of the above findings it is with great regret that the court must conclude that Mr. Berry has not proceeded in good faith in stating privileges he claims as to specific documents and has only sought to delay the proceedings of the grand jury.

On June 25, 1975, petitioner requested the district court to stay its order of June 23, 1975. The court denied that request on June 26, 1975. On the same day, the Tenth Circuit denied petitioner's motion for stay.

D. The Second and Third Contempts

Pursuant to the court's order, petitioner appeared before the grand jury on June 27, 1975, but he again declined to produce the three ledger books and the 23 boxes of records as ordered. During this appearance, petitioner also asserted the Fifth Amendment privilege on behalf of the firm's clients, himself and Mr. Marchiondo to withhold certain general account ledger cards and all of the trust account ledger cards. He specifically identified approximately 43 separate trust account ledger cards that he with-

held on that basis (Tr. 828-895).[14] As described by the district court, these cards consisted of

> [f]irst, * * * ledger account cards that reflect transactions between the law firm professional association or its predecessor and a lawyer in the firm. These include drawing accounts and loans to stockholders. Second, there are ledger account cards that record transactions of certain business investments and ventures of Mr. Marchiondo. * * * Finally, there are trust account cards that were kept to account for moneys held by the firm on behalf of clients. [Pet. App. 26a.]

The government then moved the district court to adjudge petitioner in civil contempt for failure to obey the court's June 23, 1975, order and also requested a hearing to determine the propriety of petitioner's Fifth Amendment privilege claim as to the account ledger cards. A hearing was held on July 2, 1975. Petitioner was held in contempt as to his failure to turn over the records specified in the June 23 order, and he was ordered confined. On the same day, the court overruled all of his Fifth Amendment claims as to both the general account ledger cards and the trust account ledger cards (Pet. App. 24a-30a).[15]

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[14] The assertion of the Fifth Amendment privilege before the grand jury with respect to these records, which previously had neither been ordered disclosed nor found to be privileged, was in conformity with the court's June 23 order. See Pet. App. 10a.

[15] Excepting from its order "any records pertaining to pending federal criminal cases," the court ordered petitioner

Petitioner appeared before the grand jury on July 8, but, as with the other records, he declined to turn over the ledger cards for which he had claimed a Fifth Amendment privilege. The government then moved that he be held in civil contempt for this contumacious act; a hearing was held on July 9, 1975, and petitioner was again adjudged in civil contempt (Pet. App. 31a).[16]

E. The Decision of the Court of Appeals

On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the July 2 and July 9 contempt adjudications; because the district court had vacated the May 1 judgment of contempt on a finding of compliance, the appeal from that judgment was considered moot and was dismissed (Pet. App. 33a-45a). In sustaining the two later contempt judgments, the court of appeals concluded (1) that by producing his records on May 19, 1975, petitioner had complied with the requirements of the subpoena

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to produce to the grand jury four general account ledger cards (GJ Exhibit 956), five trust account ledger cards (GJ Exhibit 957), 43 trust account ledger cards (GJ Exhibit 958), and all remaining trust account ledger cards in GJ Exhibit 860-T (Pet. App. 30a).

[16] As previously noted (*supra*, notes 4 and 5), the district court denied petitioner's motion for bail pending appeal from the July 2 contempt adjudication on the grounds that the appeal was frivolous and taken for delay, but it granted personal recognizance pending appeal from the July 9 contempt adjudication only. On considering the consolidated appeals, the Tenth Circuit denied petitioner's motion for bond. Petitioner is presently confined.

duces tecum, had purged himself of the civil contempt, and thereby waived or failed to preserve his Fourth Amendment claim; (2) that, assuming that production did not amount to waiver of the Fourth Amendment claim, the subpoena *duces tecum* was not unreasonably broad under the Fourth Amendment because the material ordered produced was relevant to the investigation, there was reasonable specificity with regard to the material ordered produced, and production of records covering only a reasonable period of time was required; (3) that since the documents with respect to which petitioner claimed a privilege were law firm documents, not the personal records of petitioner, Marchiondo, or of various clients, there was no valid self-incrimination claim; and (4) that the attorney-client and related privileges are unavailable to petitioner because the records at issue were only financial records of the professional association of which petitioner was a member and not the personal records of clients, and because the general rule that an attorney may not normally refuse to disclose the identity of a client applied to the records at issue here.

ARGUMENT

1. Petitioner argues (Pet. 18-25) that the rulings of the court below contravene the Fourth Amendment because they permit an exploratory investigation by the grand jury, the purpose and limits of which can only be determined as it proceeds. He contends that he is therefore entitled to demand a

showing of materiality and necessity, or even of probable cause, before complying with the grand jury subpoena, and he further claims that he should have the opportunity to challenge such a showing in an adversary evidentiary hearing.

a. Insofar as petitioner's Fourth Amendment claim is based on asserted oppressiveness or burdensomeness of the subpoena *duces tecum*, the court of appeals correctly concluded that this claim was not a proper issue on appeal. While petitioner initially submitted to a contempt citation rather than comply with the subpoena, he subsequently brought before the grand jury all the records called for by the subpoena, had them marked as grand jury exhibits, and, by such production, complied with the terms of the subpoena. The district court found, and the court of appeals agreed (Pet. App. 35a-36a), that he had thereby purged himself of the first contempt. Having actually produced the records, petitioner no longer has any basis for claiming that the subpoena was impermissibly burdensome or oppressive. See *Brown* v. *United States*, 276 U.S. 134, 142-143.[17] As this Court has stated: "[O]ne to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt

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[17] Notwithstanding reference to a fire in petitioner's law office, counsel expressly stated that physical impossibility of compliance with the subpoena was not being raised as a defense (Tr. 239).

on account of his failure to obey." *United States* v. *Ryan*, 402 U.S. 530, 532. See also *Cobbledick* v. *United States*, 309 U.S. 323; *United States* v. *Nixon*, 418 U.S. 683, 690-692.

b. To the extent that petitioner's Fourth Amendment objections to the subpoena are based on an asserted obligation on the government to show that the records sought are material and necessary or to demonstrate that there exists probable cause for the issuance of the subpoena, his claims are insubstantial.[18]

Initially, there is no basis for petitioner's suggestion that the grand jury's request for the law firm's records should have been more specific. The subpoena, as modified, did not demand all the records of the law firm including client files, but only its financial records excluding client files. The subpoena did not specify an unlimited time period but called for only those financial records generated in approximately the last five years—five years being the statute of limitations on a number of offenses being investigated. Furthermore, after an incident related by petitioner to the district court *in camera* concerning the ease with which financial transactions of the law firm could take place without even the firm's bookkeeper knowing about them (Pet. App. 8a), the court found that

[18] *United States* v. *Miller*, 500 F.2d 751 (C.A. 5), certiorari granted, June 9, 1975, No. 74-1179, is inapposite. The issue in *Miller* is whether a bank depositor has standing to challenge the subpoenaing of the bank's records. In the instant case there has been no dispute as to petitioner's standing to challenge the subpoena, because it is directed towards records of which he is indisputably in possession.

"it is all too apparent that the grand jury cannot possibly specify what documents they are wanting to examine without looking at all of the law firm's financial records" (*ibid.*).

Moreover, although we believe it was not necessary to do so, the government in fact made a detailed proffer demonstrating the nature of the grand jury's investigation and the need for the subpoenaed records. See p. 4, n. 1 and pp. 9-10, *supra;* Gov't Apps. A and B. Given the well-recognized broad investigative powers of the grand jury (see *United States* v. *Calandra*, 414 U.S. 338, 344; *Branzburg* v. *Hayes*, 408 U.S. 665, 701-702; *United States* v. *Morton Salt* Co., 338 U.S. 632, 642-643; *Blair* v. *United States*, 250 U.S. 273, 282; cf. *United States* v. *Bisceglia*, 420 U.S. 141) and the nature of the grand jury's investigation in this case, the grand jury's request was not unreasonable.[19]

As the court of appeals found (Pet. App. 38a), the subpoena commanded only the production of materials relevant to the investigation; moreover, it sought production of records covering only a reasonable period of time and specified the records with

[19] The grand jury is investigating alleged violations of the campaign financing and campaign contributions laws, the Hobbs Act, the Travel Act, and the mail fraud statute. The investigation involves, *inter alia*, the laundering of illegal campaign contributions, possible kickbacks to public officials, and a relationship of the Marchiondo and Berry law firm to such activities. Thus, as the proffer makes plain (see Gov't Apps. A and B), the investigation is substantially broader in scope than petitioner indicates (Pet. 5).

reasonable particularity. Indeed, the records were described specifically enough that petitioner was able to produce the designated records on May 19, 1975—in itself strong evidence of the requisite specificity, and therefore the reasonableness, of the request. *Brown* v. *United States*, *supra*, 276 U.S. at 143. In these circumstances the determinations of necessity and reasonableness made by the district judge, who has reviewed the records in detail, should prevail. For "[e]nforcement of a pretrial subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues." *United States* v. *Nixon*, *supra*, 418 U.S. at 702.

As for petitioner's argument (Pet. 19-20) that a subpoena *duces tecum* must comport with the requirements of the Fourth Amendment respecting search warrants, it is established that the reasonableness of a subpoena for the purpose of eliciting evidence that may be helpful to the grand jury in its investigation is appropriately judged by a different standard from that governing a police search or seizure that is undertaken to gather evidence of a crime. Cf. *United States* v. *Dionisio*, 410 U.S. 1, 10. While probable cause is required for a search warrant, "the Grand Jury * * * can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."

United States v. *Bisceglia*, *supra*, 420 U.S. at 148.[20] It is irrelevant that the grand jury may lack probable cause to believe that the records it seeks will reveal incriminating information, since its function is essentially exploratory.[21] The grand jury's task, after all, is to determine whether probable cause exists; it could hardly be expected to perform that function if it were required to have probable cause before undertaking its investigation.[22]

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[20] To the extent that petitioner's Fourth Amendment claim is based on an asserted right of privacy (Pet. 21-22), "[o]rdinarily, of course, a witness has no right of privacy before the grand jury. Absent some recognized privilege of confidentiality, every man owes his testimony." *United States* v. *Calandra*, *supra*, 414 U.S. at 353.

[21] The pertinent question for judging the reasonableness of a grand jury subpoena *duces tecum* is whether compliance would be unnecessarily difficult because inordinately time-consuming, expensive, or otherwise inconvenient, when measured against the relevance and materiality to the grand jury's inquiry of the items sought in the subpoena. See *McMann* v. *Securities and Exchange Commission*, 87 F.2d 377, 379 (C.A. 2), certiorari denied, 301 U.S. 684. The subpoena in this case is reasonable because the items sought by the grand jury are vital to its inquiry, and, as we have shown (see *supra*, pp. 21-23) compliance with the subpoena is not burdensome, and claims based on alleged inordinate inconvenience have been waived by petitioner's production of the subpoenaed records.

[22] Petitioner's reliance (Pet. 19-20) upon *Hale* v. *Henkel*, 201 U.S. 43, and *Schwimmer* v. *United States*, 232 F.2d 855 (C.A. 8), certiorari denied, 352 U.S. 833, is misplaced. In *Hale* v. *Henkel*, the Court held unreasonable a subpoena far more extensive than that in the instant case, but even in that context noted that such might be permissible if "some necessity should be shown * * *" (201 U.S. at 77). As we have

c. Petitioner also claims (Pet. 20-21) that he was entitled to an evidentiary hearing to contest the reasonableness of the subpoena, with the government (in petitioner's formulation) having the burden of establishing reasonableness. He effectively seeks a "preliminary hearing" at which—according to his own representations to the district court—he would be "given an opportunity to cross examine [the grand jury foreman] as to specifics" (Tr. 47) and thereby to determine "what information there exists, what evidence exists to show probable cause to require—or reasonable cause, whatever the term is—to require the production of all of this information, of all of this material" (Tr. 48).

Petitioner is not entitled to such a hearing. Not only would such a requirement wholly undermine the legitimate investigatory functions of the grand jury, the object of which is to determine whether probable cause exists (see pp. 24-25, *supra*), but it would also force the grand jury foreman to disclose matters occurring before the grand jury in violation of Rule 6(e), Fed. R. Crim. P., and provide all grand jury witnesses who have received subpoenas with routine

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shown, ample necessity was demonstrated in the case at bar. In *Schwimmer*, a subpoena demanding the production of all the records of an attorney, including diaries, memoranda, and correspondence, was considered too broad, but a second subpoena, requiring the same materials as to specific clients, was upheld. In petitioner's case, only the financial records maintained by the firm for itself or client's trust accounts were required.

discovery of grand jury information by the simple expedient of filing a motion to quash.

As this Court has said, "[a] grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated" (*United States* v. *Calandra*, *supra*, 414 U.S. at 343), and a witness is therefore not entitled "to set limits to the investigation that the grand jury may conduct." *Id.* at 345, quoting *Blair* v. *United States*, 250 U.S. 273, 282. Petitioner's claims and his conduct in this case amply demonstrate the wisdom of this Court's observation that "[a]ny holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio*, *supra*, 410 U.S. at 17.[23] See also *United States* v. *Calandra*, *supra*, 414 U.S. at 343-350; *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 701-702.[24]

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[23] Petitioner's reliance (Pet. 19-20) on the Seventh Circuit's opinion in *Mara* v. *United States*, 454 F.2d 580, reversed, 410 U.S. 19, is misplaced. This Court reversed the decision of the Seventh Circuit in *Mara*. While the Court did not rule on the question of what procedure the government must follow to establish the reasonableness of a grand jury subpoena and specifically on whether an evidentiary hearing is required, (410 U.S. at 21-22), it did hold that the government was not required to make a preliminary showing of "reasonableness" at all. It follows that there is no right to a hearing on the issue. See also *United States* v. *Dionisio*, *supra*, 410 U.S. at 17 and n. 16.

[24] In the context of this discussion of the necessity for secrecy during a grand jury's deliberative stages, it is ap-

2. As to the trust account ledger cards and general account ledger cards that were the subject of the July 9 contempt citation (see Pet. App. 30a), petitioner seeks to assert the Fifth Amendment privilege against self-incrimination. In regard to the trust account ledger cards, he purports to assert that privilege on "behalf of each client for which there exists a trust account" (Pet. 25).[25]

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propriate to dispel the notion suggested by petitioner (Pet. 17-24) that the government intends to disseminate information contained in the subpoenaed records. During one of his appearances before the grand jury, petitioner was advised only that the subpoenaed records would be examined by the grand jurors and by law enforcement officers, "federal investigators * * * working with the United States attorney's office to aid the grand jury in its investigation" (Tr. 857). There was absolutely no suggestion that the information acquired by one agency for one purpose would be disclosed to another agency "for purposes unrelated to the original subpoena" (Pet. 24). Nor, contrary to petitioner's concern that the records may become public (Pet. 17), was there any indication that the government would not comply fully with the secrecy requirements of Rule 6(e), Fed. R. Crim. P.

As for petitioner's expressed concern (Pet. 24) that the grand jury may "indiscriminately publish portions of [the subpoenaed] information in its report to the court," petitioner erroneously assumes that the grand jury is a "special grand jury," summoned under 18 U.S.C. 3331 and authorized to issue reports under 18 U.S.C. 3333. It is not. The grand jury that subpoenaed the records in question is a regular grand jury summoned under 18 U.S.C. 3321 and Rule 6, Fed. R. Crim. P., and, as such, it has no statutory mandate to submit reports to the court.

[25] It is not clear whether petitioner continues to invoke the privilege on behalf of himself as to any of the records involved in this case. In any event, such a personal claim would be without merit, for it is established that "an individual

While the Fifth Amendment protects against forced disclosures of personal papers as well as oral testimony (*Boyd* v. *United States*, 116 U.S. 616), at a minimum the papers must either be the private property of the person for whom the privilege is claimed or in his possession in a personal capacity. *United States* v. *White*, 322 U.S. 694, 699; *Couch* v. *United States*, 409 U.S. 322, 330 n. 10; *Bellis* v. *United States*, 417 U.S. 85, 90. In the case at bar, these criteria were not met, and the Fifth Amendment claim asserted by petitioner on behalf of his clients must therefore fail.

Neither the trust account ledger cards nor the four general account ledger cards constitute personal records of clients that have been placed in the custody of the law firm. Rather, the clients merely provided certain moneys to the firm, and the records relating thereto were created by the firm and maintained by the firm to reflect how the corporate entity administered these funds. As the district court found (Pet. App. 28a):

> The records were maintained on law firm purchased supplies, by law firm personnel, on law firm equipment, and commingled with other law firm records in law firm storage space. The

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cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally." *Bellis* v. *United States*, 417 U.S. 85, 88. See also *Wilson* v. *United States*, 221 U.S. 361; *Dreier* v. *United States*, 221 U.S. 394; *Wheeler* v. *United States*, 226 U.S. 478; *Grant* v. *United States*, 227 U.S. 74.

> records were never in the possession of clients or firm principals, but in fact came into their very existence as records of the firm.

In these circumstances there can be no claim that any client's personal papers were being called for by the subpoena. Rather, as in *Bellis* v. *United States*, *supra*, 417 U.S. at 97-98:

> The documents which petitioner has been ordered to produce are merely the financial books and records of the partnership. These reflect the receipts and disbursements of the entire firm, including income generated by and salaries paid to the employees of the firm, and the financial transactions of the other partners.[26]

Accordingly, the principles of law established in *Bellis* and the cases on which it relied foreclose petitioner's Fifth Amendment claims.[27] As this Court

[26] *Bellis* involved records held by a member of a law partnership, while some of the records involved here are the records of the law firm after it converted to a professional corporation. Analytically, there is no distinction for purposes of evaluating the claim of privilege. See *Reamer* v. *Beall*, 506 F.2d 1345 (C.A. 4), certiorari denied, 420 U.S. 955. See also *United States* v. *White*, *supra*; *United States* v. *Fleischman*, 339 U.S. 349, 358. Indeed, the non-privileged status of corporate records was established long before *Bellis* clarified the law regarding partnerships.

[27] *United States* v. *Kasmir*, 499 F.2d 444 (C.A. 5), certiorari granted, 420 U.S. 906, is not apposite. The issue in *Kasmir* is whether a taxpayer can bar the production of tax records owned by his accountant and which are therefore subject to subpoena, by having the records transferred to himself and his attorney. In petitioner's case, the records involved at no time were in the possession of the firm's clients, and are not arguably owned by them. *United*

said in *Couch* v. *United States*, *supra*, 409 U.S. at 328: "It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him. As Mr. Justice Holmes put it: 'A party is privileged from producing the evidence but not from its production.'" See also *United States* v. *Nobles*, No. 74-634, decided June 23, 1975, slip op., pp. 7-8.[28]

States v. *Judson*, 322 F.2d 460 (C.A. 9), cited by petitioner, is also inapplicable here. In *Judson*, a subpoena directed to an attorney was quashed because the records called for were either the personal records of his clients which had been placed with him or data developed by an accountant expressly for the purpose of assisting the attorney in advising the clients regarding a tax investigation.

[28] Petitioner seeks to avoid the unavailability of the Fifth Amendment privilege by suggesting (Pet. 25) that certain of the subpoenaed records contain confidential information that is protected by the attorney-client privilege. However, as the district court expressly found (Pet. App. 14a-15a), petitioner conceded in his brief filed there "that the identity of a client and the amount of fee paid by a client does not fall within the attorney-client privilege." Thus, the claim is unavailable to petitioner in this Court. Moreover, petitioner fails to acknowledge that most of the client cards, constituting nine cartons of records, were specifically excluded from the production order of the district court in an effort to effectuate a compromise between the government and petitioner. See Tr. 693-701. In any event, it is established that records reflecting financial transactions, fee arrangements and the like are not protected by the privilege. See, *e.g.*, *In re Michaelson*, 511 F.2d 882 (C.A. 9), certiorari denied May 19, 1975, No. 74-1101; *United States* v. *Ponder*, 475 F.2d 37 (C.A. 5); *United States* v. *Hodgson*, 492 F.2d 1175 (C.A. 10); *Securities & Exchange Commission* v. *First Security Bank of Utah*, 447 F.2d 166 (C.A. 10).

3. Finally, petitioner claims (Pet. 29-31) that the thirty-day appeal period specified by 28 U.S.C. 1826 (b) denied him a "constitutional and statutory right to appeal" because that period was allegedly insufficient to allow the court of appeals to review the case adequately.

Although probably under no constitutional obligation to afford adjudicated contemnors any right of appeal whatsoever (cf. *Estelle* v. *Dorrough*, 420 U.S. 534, 536-537; *Ross* v. *Moffitt*, 417 U.S. 600, 609-611; *Griffin* v. *Illinois*, 351 U.S. 12, 18), Congress in 28 U.S.C. 1826(b) has expressly granted the right of appeal, providing in connection therewith that "[a]ny appeal from an order of confinement under this section shall be disposed of * * * not later than thirty days from the filing of such appeal." The reasons for such expedition are apparent. The judgment imposed upon a recalcitrant individual under Section 1826, as civil contempt, is a coercive device intended to secure compliance with a court order; the judgment terminates immediately upon compliance. Such an enforcement power is essential to the expeditious functioning of the judicial system, and the power can be effective only if the judgment of civil contempt may be quickly reviewed and, in appropriate cases, affirmed. See *Shillitani* v. *United States*, 384 U.S. 364; cf. *United States* v. *Liddy*, 510 F. 2d 669 (C.A. D.C.), certiorari denied, 420 U.S. 980. The Constitution does not require Congress to forego these objectives.

Moreover, the record in this case does not indicate that the process of review, while necessarily expedited

under Section 1826, was inadequate. It is true that the court of appeals did not itself conduct an inspection of the 34 cartons of records involved, but this process, we submit, was the function of the fact-finder, the district court. The court of appeals had the benefit of the district court's tireless efforts, reflected in its numerous orders and memorandum opinions containing detailed legal analysis and factual findings. It also had the 1100 page transcript of the district court hearings, the exhaustive briefs filed by both parties, and each side's analysis provided at oral argument. In these circumstances, the relevant issues were certainly fully exposed and thoroughly canvassed.[29]

[29] Petitioner mentions, but does not raise as a separate point or discuss (Pet. 17), alleged electronic surveillance. However, his assertion (Pet. 17) that the Assistant United States Attorney "admitted there had been what he classified as 'consensual' electronic surveillance of petitioner and members of his firm" is not accurate. While the record in the district court may be ambiguous on this point (see Tr. 1072), any ambiguity was eliminated when, in response to a direct inquiry from the court of appeals at oral argument, the government made plain what was intended by its representation in the district court—namely, that while there may have been consensual interceptions of other witnesses or targets of the investigation, there were no consensual monitorings of any conversation, whether by telephone or in person, to which petitioner was a party. The court of appeals stated (Pet. App. 42a): "The government assured the trial court, and in oral argument assured us, that there was no illegal surveillance of the witness [petitioner]. We credit the government with good faith." The court also concluded that because petitioner was not a party to any intercepted wire or oral communication or a person against whom the interception was

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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directed, he was not an aggrieved person and had no standing to raise any claim of illegal electronic surveillance (Pet. App. 42a-43a). See *Gelbard* v. *United States*, 408 U.S. 41, 61 and n. 21; *Taglianetti* v. *United States*, 394 U.S. 316.

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